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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 229.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COLUMBIAN ENAMELING AND STAMPING COMPANY, INC.,
Respondent,

HARRY HIATT, JOHN H. OSBORNE, EDWARD J. GEORGE, RAYMOND ALCORN, JOHN WHITLOCK, CLARENCE BAKER et al., Employees of COLUMBIAN ENAMELING AND STAMPING COMPANY, INC.,
Respondent,
Interveners.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF INTERVENERS.

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INDEX.

CITATIONS.

Cases.

Statutes.

Miscellaneous.

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OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, the court below, appears in the record at pages 415 to 425, and is reported in 96 F. (2) 948. The decision of the National Labor Relations Board, petitioner, appears in the record at pages 372 to 393.

JURISDICTION.

The judgment of the court below denying enforcement of petitioner's order, was entered on April 28, 1938. The petitioner filed the present petition on July 28, 1938, and certiorari was granted on October 10, 1938. The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended, and Section 10 (e) of the National Labor Relations Act.

STATUTE INVOLVED.

The statute involved herein is the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C. A., Section 151 et seq.), to which reference will be made from time to time in the argument.

The sections of the act pertinent to interveners herein are set out in appendix A, infra.

QUESTIONS PRESENTED.

1. Whether the interveners were accorded due process of law by the petitioner.

2. Whether the petitioner has authority to order the discharge of the interveners in order to make jobs for the strikers.

3. Whether the petitioner's order that the respondent cease and desist from refusing to bargain collectively with the union is proper.

4. The decision of the Circuit Court of Appeals for the Seventh Circuit denying petitioner's petition for enforcement of order of the National Labor Relations Board should be affirmed.

STATEMENT OF THE CASE.

The facts of this case, in so far as the interveners are concerned, are very simple and may be briefly stated. The interveners are employees of the respondent, Columbian Enameling and Stamping Company, Inc., and intervened in the instant case while it was pending in the court below. At the time of such intervention there were 203 interveners. The purpose for which the interveners desired to become parties in the court below was to defend themselves against the enforcement of the petitioner's order. Inasmuch as the petitioner is now asking this Court to review the refusal of the court below to enforce said order, the interveners wish to bring to the attention of this Court the impropriety of the aforesaid order as it affects them.

The respondent experienced a strike at its plant on March 23, 1935 (R. 213), called by the Enameling and Stamping Mill Employees Union No. 19694, in accordance with a strike resolution (Petitioner's Exhibit 2) to the effect that the members of the union would not continue to work with nonmembers. After a complete suspension of operations the respondent opened its plant on July 23, 1935 (R. 238), taking back strikers without discriminating against them because of the strike (R. 140), and many strikers did go back to work (R. 242). On July 23, 1935, and shortly thereafter, many of the aforesaid interveners became employees of the respondent and have continued in that relationship ever since.

On October 31, 1935, Otis Cox, secretary of the Union, filed a charge with the National Labor Relations Board against the respondent (R. 5-7). On November 21, 1935, the National Labor Relations Board issued a complaint against the respondent (R. 7-10), and, after an answer was

filed by the respondent (R. 11-18), a hearing was held on the aforesaid complaint, which hearing commenced on December 9, 1935, and ended on December 11, 1935. None of the interveners was given any notice of the proceedings above mentioned, had no opportunity to appear therein, and were not represented in any of said proceedings.

On February 14, 1936, the National Labor Relations Board issued the following order:

> "On the basis of the findings of fact and conclusion of law and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, the Columbian Enameling & Stamping Company, and its officers and agents, shall take the following action, which the Board finds will effectuate the policies of the Act:
>
> "1. Discharge from its employment all production employees who were not employed by it on July 22, 1935, and reinstate to the vacancies so created individuals who were so employed and have not since received substantially equivalent employment elsewhere and place the remainder of such individuals on a list to be called for reinstatement as and when their labor is needed.
>
> "2. Upon reinstating its employees as required in paragraph 1 of this order, shall cease and desist from refusing to bargain collectively with Enameling & Stamping Mill Employees Union, No. 19694, as the exclusive representative of the production employees employed by respondent in respect to rates of pay, wages, hours of employment and other conditions of employment.
>
> "3. File with the National Labor Relations Board on or before the thirtieth day from the date of service of this Order, a report in writing setting forth in detail

the manner and form in which it has complied with the foregoing requirements.

"Signed at Washington, D. C.

"This 14th day of February, 1936.

J. Warren Madden,
Chairman,

John M. Carmody,
Member,

Edwin S. Smith,
Member,

National Labor Relations Board."

The order was based principally on the finding that the respondent refused to meet with certain conciliators of the United States Department of Labor and a committee of the union a few days after July 23rd or 24th, 1935 (R. 386). The aforesaid refusal was considered by the Board to be a violation of Section 8, Subdivision (5) of the National Labor Relations Act in that it constituted a refusal by the respondent to bargain collectively as required by said act and hence was an unfair labor practice.

Said National Labor Relations Board filed a petition in the court below asking for enforcement of the aforesaid order on July 9, 1937. The court below refused to enforce said order and found, among other things, that the aforesaid strike of March 23, 1935, was in violation of a contract between the aforesaid union and the respondent (R. 423), so that the strikers ceased to be employees of the respondent on March 23, 1935 (R. 420).

One hundred twenty-nine (129) of the interveners herein became employees of the respondent between July 23, 1935, and December 9, 1935, the date the hearing commenced as

aforesaid. Seventy-four (74) of the interveners herein have become employees of the respondent since February 14, 1936, the date the aforesaid order was issued. The first paragraph of the petitioner's order requires the respondent to discharge all of the interveners so that the strikers may be given the jobs now held by the interveners.

SUMMARY OF THE ARGUMENT.

POINT I.

THE FIRST PARAGRAPH OF THE PETITIONER'S ORDER IS INVALID FOR THE REASON THAT IT DEPRIVES THE INTERVENERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

A.

The Fifth Amendment to the United States Constitution Enjoins the Federal Government From Depriving a Person of His Property Without Due Process of Law: A Man's Job Is Property Within the Protection of the Constitution.

It is elementary that neither Congress nor any other federal agency may deprive a person of his property without according to him such consideration as is designated in the Fifth Amendment to the Constitution by the term "due process of law." The occupation by which one makes his living is considered "property" within the meaning of the Fifth Amendment. (**Ex Parte Wall**, 107 U. S. 265 [1883].)

B.

The Interveners Who Became Employees of the Respondent Prior to December 9, 1935, Were Entitled to Notice of the Hearing Held by the Petitioner, and Should Have Been Given an Opportunity to Be Heard in Said Proceedings.

It must be assumed that the petitioner contemplated that the result of the hearing it held might deprive the interveners of their property rights inasmuch as the order it issued does have that effect. It follows, therefore, that the interveners were entitled to notice of the hearing and an opportunity to appear therein to protect their rights. A fair hearing is an integral part of due process of law. **Morgan v. United States,** 58 S. Ct. 773, at 777 (1938). Notice and a fair hearing cannot be denied the interveners on the ground that their employment with the respondent was subject to regulation by the Federal Government. The interveners had no notice that the jobs they accepted with the respondent were in jeopardy.

POINT II.

THE FIRST PARAGRAPH OF THE PETITIONER'S ORDER EXCEEDS THE AUTHORITY CONFERRED UPON THE PETITIONER BY THE NATIONAL LABOR RELATIONS ACT.

A.

The Order Is Too Broad in That It Requires the Respondent to "Reinstate" Strikers, Not to Their Former Jobs, But to the Vacancies Created by Discharging the Interveners.

Under the terms of the National Labor Relations Act, Section 10, the petitioner may order the **reinstatement** of

employees. Assuming that the strikers are employees, the most that the petitioner could order in the case at bar is that the respondent reinstate the strikers to the positions they formerly held.

The petitioner in other cases has ruled that a striker or a person discriminatorily discharged need not accept his employer's offer of a different job from that which he formerly held. The rule should work both ways.

B.

The Order Is Too Broad in That It Requires the Discharge of Interveners Hired Before the Alleged Refusal to Bargain.

This Court has held that the petitioner may not order the reinstatement of strikers whose jobs were filled prior to the commission of an unfair labor practice. **National Labor Relations Board v. Mackay Radio & Telegraph Co.,** 304 U. S. 333 (1938).

C.

The Order Is Too Broad If It Is Interpreted to Require the Discharge of Those Interveners Who Were Hired by the Respondent After February 14, 1936.

The petitioner necessarily could make no finding that the interveners hired after the date of its order occupied positions formerly held by strikers. There is, therefore, no basis upon which the petitioner could interfere with the employment of the aforesaid interveners.

D.

The Order Unjustly Punishes the Interveners and Should Not Be Enforced.

The petitioner may not issue an order that is punitive. The order in the instant case is punitive rather than

remedial, as it imposes undue hardship on the interveners and does not correct any situation for which either the respondent or the interveners are responsible.

POINT III.

THE SECOND PARAGRAPH OF THE ORDER DENIES THE INTERVENERS THE RIGHT TO PARTICIPATE IN THE SELECTION OF THEIR REPRESENTATIVES FOR COLLECTIVE BARGAINING PURPOSES.

The interveners, as employees of the respondent, are entitled under the National Labor Relations Act to bargain with the respondent through representatives of their own choosing. The order imposes upon the interveners a representative selected by the petitioner, rather than a representative in the selection of which the interveners have participated.

POINT IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITIONER'S PETITION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD SHOULD BE AFFIRMED.

Upon review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the Court.

> Myers v. Bethlehem Ship Building Corp., 303 U. S. 41, 58 Sp. Ct. 459—1938.

If the petitioner is entitled to invoke the equity powers of a court to secure reinstatement of a contract violated by one group of employees, the same equity court has power to decree equity between all parties before it.

ARGUMENT.

POINT I.

THE FIRST PARAGRAPH OF THE PETITIONER'S ORDER IS INVALID FOR THE REASON THAT IT DEPRIVES THE INTERVENERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

1. The argument herein made by the interveners is made on the assumption that the strikers were employees on and after July 5, 1935. The assumption, ho ver, is made only for the sake of argument, for the interveners are in complete accord with the decision of the court below that the strikers ceased to be employees when they struck in violation of their contract.

A.

The Fifth Amendment to the United States Constitution Enjoins the Federal Government From Depriving a Person of His Property Without Due Process of Law; A Man's Job Is Property Within the Protection of the Constitution.

It cannot successfully be denied that the Constitution, in the Fifth Amendment, limits the Federal Government, of which the petitioner is an agency, in its exercise of the power to deprive persons of their property. The specific restriction upon the exercise of such power is that the power be exercised in accordance with the concept of due process of law. It further cannot be denied that one's occupation, whether it be the practice of one of the learned professions or the doing of manual labor, is property

within the meaning and protection of the Fifth Amendment. **Ex Parte Wall**, supra.

B.

The Interveners Who Became Employees of the Respondent Prior to December 9, 1935, Were Entitled to Notice of the Hearing Held by the Petitioner, and Should Have Been Given an Opportunity to Be Heard in Said Proceedings.

The petitioner must be deemed to have known of the fact that certain of the interveners were employed by the respondent prior to the dates upon which the complaint was filed and the hearing commenced in the instant case. Furthermore, on those dates the petitioner must be deemed to have known that its proceedings might affect the rights of the interveners. On February 14, 1936, the petitioner certainly knew that its order, if carried out, would deprive the aforesaid interveners of their property. The petitioner ignored the prohibition of the Fifth Amendment by issuing its order without affording a hearing to the interveners. In a situation such as is found in the instant case, due process of law includes a hearing in which those who are to be affected by the petitioner's action may present their case. Although not a case arising under the National Labor Relations Act, the recent decision of this Court in **Morgan v. United States**, supra, compels such a conclusion.

The necessity of affording the interveners a hearing cannot be escaped from on the ground that the interveners were bound to know that when they accepted their jobs with the respondent they were charged with notice that their employment was subject to regulation by the petitioner. The record is clear that the respondent imposed

no discriminatory conditions upon strikers when it opened its plant on July 23, 1935. The strikers and the interveners were upon an equal footing in applying for jobs. Assuming that some of the interveners hired between July 23, 1935, and the date of the hearing were hired after the commission of an unfair labor practice by the respondent, it was an act of which the interveners had no knowledge, and they should not be affected thereby. The recent decision of this Court in **Consolidated Edison Co. of New York et al. v. National Labor Relations Board**, No. 19, October Term, 1938, is applicable here. In that case it was held, inter alia, that the validity of the collective bargaining contracts between the companies and the unions could not be determined by the Board because the contracts were not put in issue by the complaint. For the same reason, even assuming that the interveners had notice of the hearing, the validity of their contracts could not be determined by the Board, for their employment contracts with the respondent were not assailed by the complaint and no issue as to the validity thereof was litigated.

POINT II.

THE FIRST PARAGRAPH OF THE PETITIONER'S ORDER EXCEEDS THE AUTHORITY CONFERRED UPON THE PETITIONER BY THE NATIONAL LABOR RELATIONS ACT.

The petitioner is empowered, upon finding that an employer has committed an unfair labor practice, to order the employer to take affirmative action including reinstatement of employees with or without back pay [Section 10 (c) of the National Labor Relations Act]. The order, quoted above at page 4, requires, in the first paragraph thereof, that the respondent discharge the persons em-

ployed by it since July 22, 1935, and reinstate to the vacancies so created those strikers who did not return to work when the respondent opened its plant on July 23, 1935. Whether the order requires the discharge of all persons hired by the respondent for the first time since July 22, 1935, or only so many thereof as are necessary to make room for the strikers, it is submitted that the order is improper for the reason that it exceeds the petitioner's authority.

A.

The Order Is Too Broad In That It Requires the Respondent to "Reinstate Strikers Not to Their Former Jobs But to the Vacancies Created by Discharging the Interveners.

The accepted meaning of the word "reinstate" is to instate again to a former position, or to restore one to a position from which he had been removed ("reinstate," Webster's New International Dictionary, page 1799). That is the sense in which Congress may be assumed to have used the word for the act does not define "reinstate." The first paragraph of the order does not follow the act for it contemplates the placing of strikers in the jobs now held by interveners without regard to whether the strikers as individuals held said jobs prior to the strike of March 23, 1935.

The petitioner has held that if an employer offers a striker or a person unlawfully discharged a job other than that which he held prior to the strike or wrongful discharge, such person is not required to accept the offer as he is entitled to his former job. **In re Western Felt Works and Textile Workers Organizing Committee**, Case No. C-490, decided December 12, 1938, Labor Relations

Reporter, December 26, 1938, pages 17-21. The rule should work both ways—the petitioner should be limited to requiring an employer to give back a striker or unlawfully discharged employee his former job, and not some other job. The petitioner's order, therefore, must be limited, in argument, to the reinstatement of strikers to the jobs they formerly held, when such jobs are now held by persons hired for the first time since July 22, 1935.

If any jobs formerly held by strikers have been abolished, the respondent cannot be required to discharge any of the interveners to make room for strikers formerly holding such jobs, **National Labor Relations Board v. Bell Oil & Gas Co.**, 98 F. (2d) 405 (C. C. A. 5th, 1938), where the Court refused to punish for contempt an employer that failed to obey an order that required the reinstatement of an employee to his former job as part of a crew of three men, where, through a change in operations, the position of the former employee had been abolished.

B.

The Order Is Too Broad in That It Requires the Discharge of Interveners Hired Before the Alleged Refusal to Bargain.

The statement of the case, supra, at page 3, shows that the petitioner itself found that the event deemed by it to be a refusal on the part of the respondent to bargain collectively with the union took place a few days after July 23 or 24, 1935. The reinstatement of strikers is supposedly to correct the situation created by the alleged refusal to bargain. It follows that the reinstatement of strikers may not be ordered unless the positions of such strikers were filled after said alleged refusal to bargain (**National Labor Relations Board v. Mackay Radio &**

Telegraph Co., supra.) A necessary result of the **Mackay** case is that the petitioner may not under any conditions here order the discharge of any interveners hired by the respondent during the period from July 23, 1935, until a few days after July 23 or July 24, 1935. See, also, **Black Diamond S. S. Corp. v. National Labor Relations Board**, 94 F. (2d) 875 (C. C. A. 2nd, 1938). Its order is too broad and should not be enforced.

C.

The Order Is Too Broad If It Is Interpreted to Require the Discharge of Those Interveners Who Were Hired by the Respondent After February 14, 1936.

The interveners' brief in the court below advanced the argument that the order was improper in that it required the discharge of those interveners, seventy-four in number, who were hired since the issuance of the petitioner's order. Inasmuch as the petitioner did not deny that its order has such effect, the petitioner must intend that these interveners referred to should be discharged.

Since the only justification for an order that the interveners be discharged is that they hold jobs rightfully those of strikers, the order in the instant case, under the construction placed thereon by the petitioner, is obviously improper. The petitioner has not made and could not make any finding that the interveners, who became employees of the respondent after February 14, 1936, hold jobs rightfully those of strikers. On the present state of the record the petitioner's order in the respect here under discussion is entirely unjustified and should not be enforced.

The same conclusion may be reached from the standpoint of the time when the rights of employees covered

by the petitioner's orders become fixed. It has been held that an employer may not evade its obligation to reinstate an employee, imposed by an order of the petitioner, on the ground that, subsequent to the date of the order, the employee obtained equivalent employment elsewhere and thus ceased to be an employee within the meaning of the act. **National Labor Relations Board v. Carlisle Lumber Co.**, 99 F. (2d) 533, 538 (C. C. A. 9th, 1938). If an employee's rights under the act may not be cut down after the date of an order fixing his rights, for the reason that they become fixed as of such date, how can it reasonably be said that an employee's rights thus fixed can be enlarged? It is submitted that the question answers itself, and that the petitioner could not lawfully order the discharge of persons hired by the respondent after the issuance of said order.

D.

The Order Unjustly Punishes the Interveners and Should Not Be Enforced.

The authority of the petitioner to order an employer to take such affirmative action as will effectuate the policies of the act has recently been restricted by this Court to the ordering of remedial as distinguished from punitive action. **Consolidated Edison Co. of New York et al. v. National Labor Relations Board**, supra.

It is respectfully submitted that the order requiring the discharge of the interveners is clearly punitive. The interveners who were employed prior to the hearing were employed on the same terms available to and accepted by many of the strikers. The interveners were not in any sense "strike breakers." They availed themselves of an opportunity to go to work for the respondent and had no

notice, either actual or constructive, that the respondent had violated the National Labor Relations Act, assuming that it had. This Court, it is submitted, will not censure men for applying for and obtaining available jobs in the summer and fall of 1935, for it will take cognizance of the fact that employment of any kind was difficult to obtain during the depths of the recent depression. For the petitioner to prefer men who refused to work when they had the chance to resume employment over men who accepted employment in all good faith seems to the interveners to be highly arbitrary. When such preference is shown to men who had, prior to their refusal to accept work, quit their jobs in violation of a reasonable collective bargaining contract with their then employer, the conduct of the petitioner seems to the interveners to be both a vindictive attack on them for a condition for which they are in no sense responsible, and a far, far cry from action to be expected from an agency designed by Congress to protect them and their fellow workmen from unfair labor practices of employers, affecting commerce.

POINT III.

THE SECOND PARAGRAPH OF THE ORDER DENIES THE INTERVENERS THE RIGHT TO PARTICIPATE IN THE SELECTION OF THEIR REPRESENTATIVES FOR COLLECTIVE BARGAINING PURPOSES.

Under the Act, Section 7, the interveners as employees are entitled to a voice in the selection of their representatives for collective bargaining purposes. The order, by requiring the respondent to bargain with the union, deprives the interveners of their rights, as they did not select the union as such representative. The provision of

the order just referred to, therefore, should not be enforced.

It is perhaps the intent of the petitioner that the second paragraph of the order should not be enforced unless the first paragraph thereof be enforced, because the second paragraph conditions the injunction that the respondent "cease and desist" upon the reinstatement required in paragraph one of the order. In that case, since the first paragraph of the order should not be enforced, the second paragraph should likewise be set aside.

The second part of the order is in violation of Section 9 (a) of the Act, in that said second paragraph of the order denies the interveners as employees to designate representatives or to select representatives for the purposes of collective bargaining, in that the second paragraph of the order directs that the respondent shall cease and desist from refusing to bargain collectively with Enameling and Stamping Mill Employees Union No. 19,694 as exclusive representatives of the production employees in respect to rates of pay, wages, hours of employment and other conditions of employment. It does not permit the interveners herein, who constitute a majority of the employees, to select representatives for the purpose of collective bargaining, which representatives, if selected by the interveners herein, employees of the respondent, are to be the exclusive representatives of the interveners herein for the purpose of collective bargaining in respect to rates of pay, wages and hours of employment, or other conditions of employment, as is provided in Section 9 of the Act. The said paragraph two of the order aforesaid would deny representatives of the interveners herein, when selected, of the right to bargain collectively with the respondent.

POINT IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITIONER'S PETITION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD SHOULD BE AFFIRMED.

This Court has held, in Myers v. Bethlehem Ship Corporation, supra, that, upon review by a Circuit Court of Appeals, all questions relative to the jurisdiction of the Board, the regularity of its proceedings and all questions of constitutional rights or statutory authority are open for examination by the Court. The court below, therefore, had a right to inquire into the regularity of the proceedings before the National Labor Relations Board to determine as to whether the facts found by the Board supported the order that was made by the Board and whether or not the evidence supported the finding of the Board, and whether or not the order as so entered by the Board was within the scope of the regularity provisions of the act. This was the function of the Circuit Court of Appeals when the petitioner herein filed its petition to enforce the order of the National Labor Relations Board. This contention is supported by the decision of the Circuit Court of Appeals for the Fifth Circuit in National Labor Relations Board v. Bell Oil & Gas Company, 91 F. (2d) 509.

The court below, upon review, was enjoined with the duty of inquiring into the regularity of the proceedings, the further duty to ascertain as to whether the facts found by the Board supported the order and the evidence supported the finding, and, in doing so, they must take into consideration the fact that the petitioner herein, who invoked the equity powers of the Court to secure the rein-

statement of the members of the Stamping Mill Employees Union No. 19694 under a contract of employment that had been violated by them, that this same court had power to decree equity between the interveners herein and the respondent and the members of said Local Union. Equity being thus invoked, the public interests were controlling upon this court of equity in that the Court might determine as against a group of employees who came into the court with a contract that had been violated by them, as was found by the court below, who chose to remain idle when an opportunity was offered them to work on equal basis with the interveners, and they refused, as against the interveners herein, who feel that their right to work should not be taken away from them and they should not be thrown out of a peaceful employment, and the Court, in choosing as between a group of employees who came into equity with unclean hands and a group of individuals who came in with clean hands, the order of enforcement as against the interveners herein could not be enforced.

It is the well established law that a court of equity, having jurisdiction of the parties and the subject matter, will make its jurisdiction effectual for complete relief. Ober v. Gallagher, 93 U. S. 199. And when its jurisdiction has been invoked for any equitable purpose, the Court will proceed to determine any other equities existing between the parties connected with the main subject of the suit, and grant all relief necessary to an entire adjustment of said subject. Gromley v. Clark, 134 U. S. 338, 10 Sp. Ct. 554.

It is the general principle of equity laid down by this Court and many other courts of federal jurisdiction, too well known to comment upon, that a decree affecting absent parties is unauthorized. The interveners herein were not parties to the action. They did not become parties

until permission was granted them to intervene in the court below. One hundred and twenty-nine of the interveners herein became employees of the respondent between July 23, 1935, and December 9, 1935, being the date the hearing commenced aforesaid. Seventy-four of the interveners herein have become employees of the respondent since February 14, 1936, the date the aforesaid order was issued. All of the interveners herein were employees of the respondent corporation at the time of the decision rendered by the court below.

Appendix B sets out the group of employees who have become employees since February, 1936, and all other employees mentioned in Appendix C in the joinder in said petition became employees of the respondent corporation since July 23, 1935.

Interveners herein most seriously contend that their right to work, to enjoy the fruits of their labors, to work in harmony with the respondent, is a superior right than the right of the striker, who violated his contract and destroyed the property of his employer, in that the record discloses that the striker causes loss amounting from $2,500.00 to $5,000.00 per month to the respondent employer by reason of spoiled ware, and that the purpose of the act is to promote peace and harmony between employer and employee rather than strife, bitterness, hatred and misunderstanding, and that the petitioner who came into the court of equity to enforce the order on behalf of the strikers must comply with the rules of equity, that is, they must come in with clean hands and a pure conscience, and that equity will not permit them to derive a benefit by reason of their breach of duty and obligation, and, to the contrary, equity should and will grant to the interveners herein the privilege to enjoy unmolested that position they seek to protect.

CONCLUSION.

The interveners respectfully submit that the order of the petitioner involved in the case at bar was properly denied enforcement by the court below, for the reason that the strikers, whose reinstatement, at the expense of the interveners, is sought by the petitioner, ceased to be employees when they struck. It is also respectfully submitted that the order aforesaid is invalid, and was properly denied enforcement by the court below, for the reason that it deprives the interveners of their property without due process of law, and for the further reason that it exceeds, in its entirety, the authority of the petitioner under the National Labor Relations Act.

Respectfully submitted,

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APPENDIX A.

The provisions of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C. A., Section 151 et seq.), pertinent to interveners, are as follows:

Sec. 2. When used in this Act:

(9) * * * The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, * * *.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 9. (a) * * * Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

APPENDIX B.

The pertinent allegations in interveners' petition to intervene in the Circuit Court of Appeals for the Seventh Circuit relative to interveners' employment with reference to the date of the order of the National Labor Relations Board is as follows:

6. These petitioners further aver that the following employees, to wit: Homer Arney, James Cooper, Clyde McConkey, Harold Olker, J. T. Crume, William Hamilton, William Lamb, Hubert Coleman, Kathleen Campbell, Jack Payne, Claude Burke, Warren Chickadaunce, Lillian Humphrey, Arthur Tayler, R. G. Wood, M. E. Brown, Paul LeConte, Clifford Miley, E. E. Fried, Donald Woodruff, W. W. Ferguson, R. H. Malone, Bert White, E. C. Myles, H. M. Benton, H. L. Boyd, Fred Doss, V. M. Kester, H. T. Scott, Berlen Boyle, E. G. Welch, C. L. Gordon, C. B. Wright, F. D. Pugh, H. J. Rickelman, J. R. Sturgell, L. E. Collins, M. F. Hajdu, Harry Hiatt, Homer Crady, Leon Blakely, Harold Chamberlain, Ray Chamness, H. D. Coleman, W. V. Lindholm, Dale Myers, M. T. Petzold, H. E. Higginbotham, Russel Minger, Louis Burgess, John Tanner, Herman Redman, Leroy Nevins, G. P. Schell, Bert Roberts, S. S. Mullikin, Martin Thompson, Ralph Hodges, C. A. Arnold, Helen Anderson Fried, B. M. Geiselman, R. C. Fox, Roy Perkins, G. R. Cramer, Hermine Fields, C. C. Adkins, E. B. Sharpe, Homer Gray, M. E. Sexton, J. W. Cooper, G. A. Mitchell, Fred Smith, H. J. Myers, Kenneth Meneely, C. E. Ellenberger, H. E. Day, D. C. Pickett and M. F. Camp, have become employees of the respondent Columbian Enameling & Stamping Company, Inc., since the entering of said order by the petitioner, National Labor Relations Board, on the 14th day of February, 1936, and this is the first oppor-

tunity that these petitioners have had to file this petition to intervene in this cause, and they have just learned of the pendency of said cause of action, in that on the 14th day of February, 1936, they were not then and there employees of the respondent, Columbian Enameling & Stamping Company, Inc.

7. That these petitioners, and all other employees of respondent similarly situated except those persons mentioned in paragraph identified 6 above, were in the employ of the respondent, Columbian Enameling Company, Inc., from and on the 9th day of December, 1935, and to the 14th day of February, 1936, as aforesaid (R. 408-409).

APPENDIX C.

The joinder of employees of the respondent so filed in the Circuit Court of Appeals for the Seventh Circuit (omitting the caption) is as follows:

Joinder in Petition.

We, the undersigned, being employees of Columbian Enameling & Stamping Company, Inc., the respondent in the above entitled proceedings hereby state and declare that our situation is similar to that of the Petitioners in the foregoing petition, in that we have become employees of the respondent Company since July 22, 1935, and our employment is therefore, seriously affected and threatened by the order of the National Labor Relations Board, sought to be enforced herein, which order is as follows:

> On the basis of the findings of fact and conclusions of law and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, the Columbian Enameling & Stamping Company, and its officers and agents, shall take the following action, which the Board finds will effectuate the policies of the Act:
>
> 1. Discharge from its employment all production employees who were not employed by it on July 22, 1935, and reinstate to the vacancies so created individuals who were so employed and have not since received substantially equivalent employment elsewhere and place the remainder of such individuals on a list to be called for reinstatement as and when their labor is needed.
>
> 2. Upon reinstating its employees as required in paragraph 1 of this order, shall cease and desist from

refusing to bargain collectively with Enameling & Stamping Mill Employees Union, No. 19694 as the exclusive representative of the production employees employed by respondent in respect to rates of pay, wages, hours of employment and other conditions of employment.

3. File with the National Labor Relations Board on or before the thirtieth day from the date of service of this Order, a report in writing setting forth in detail the manner and form in which it has complied with the foregoing requirements.

And we desire to join and do hereby join the Petitioners in their averments and prayers of their petition.

John H. Osborne, Dorval D. Bailey, F. W. Murphy, J. S. McCrory, A. J. Hogar, H. C. Scott, B. F. Paver, L. E. Scott, L. T. Brady, R. L. Jenks, E. G. Hoare, H. B. Sparks, Earl Walker, Stanley H. Jones, William Hamilton, LeRoy F. Andrews, E. W. Jones, S. S. Mullikin, L. Burgett, H. L. Coker, W. O. McBeth, A. A. Rennels, A. W. DePlanty, C. S. Miley, L. A. Newell, A. R. Stevens, L. V. Newell, N. V. Jones, O. A. Geckler, James P. Boone, T. Tanner, J. E. Tovey, H. D. Skidmore, C. H. Edward, Gordon Jackson, Roy Myers, Paul E. Wilbur, Chester L. Gordon, Joe Barnett, Clay Johnson, H. Chamberlain, W. W. Jones, A. L. Daniels, R. H. Thornton, Everett W. Creasey, Homer Gray, Mervin W. Padgett, Francis J. Wilson, Ray Chamness, Jack Payne, Warren P. Chicadaunce, Harrold Maloney, Joseph C. Smith, C. J. Herter, LeRoy Nevins, Harrel J. Rickelman, Leon R. Blakely, Martin W. Thompson, H. M. Hussong, H. L. Titus, Kenneth H. Smith, Chester Nelson, James F. Leek, William H. Lamb, R. G. Williams, M. F. Hajdu, J. A. Coffman, C. A. Arnold, H. E. Grady, H. R. Arney, Dave Andrews, F. J. Smith, M. E. Brown, Harold J. Myers, W. W. Ferguson, William Muffett, Joseph Sturgell, W. A. Casel, F. M. Camp, Dale Myers, Claude Burke, Millard E. Saxton, John

T. Crume, Clyde W. McConkey, H. E. Higginbotham, Ben Butler, Fred Doss, H. E. McFadden, R. H. Malone, H. O. Coleman, James W. Cooper, Paul V. Weeks, Herman C. Redmon, Herman Gorman, Loren Ring, George A. Mitchell, Vaughn Kester, John D. Miller, Donald Woodruff, Charles E. Ellenberger, Helen Lawson, Guy Nicles, Robert C. Fox, Rose Dragon, Helen Gaipo, William V. Lindholm, Agnes McCord, S. E. Trager, H. D. Kuhn, Gilbert H. Sexton, Estel Dalgarn, Raymond R. Denney, Harold E. Day, Larry Neale, Eva Smith, C. P. Shell, Roy Perkins, Glenn Cramer, Dottie Jones, John Urden, Chas. T. Keller, John Olwell, H. P. Came, J. R. McClean, Robert W. Belt, Walter Hill, G. F. Rice, Carl L. Belt, Henry Stott, Roger A. Winters, Bert A. Roberts, F. D. Youngen, Earl Bridgwater, Murval H. Nickles, Lyle E. Collens, C. W. Swiger, Charles L. Spore, Butis M. Gusilman, Ogle Starkey, Eugene Myers, Cala V. Stwens, C. B. Baker, Kennard Denny, Orville Smith, Don C. Maloney, Wayne Caress, Robert Bates, Robert A. Pinson, Rosemary Pattison, Martha Jane Bates, Lois Kuhn, Edwin M. Roberts, Ray Howard, Russell C. Minger, Helen Fried, Paul Gentry, Elizabeth Murray, H. G. Bailey, Walter V. Shepard, K. W. Bragg, Dorris Miller, Jewell Boyles, Irene Kosco, Raymond Wood, Elizabeth Lewis, Frank Cotton, Herbert T. Scott, M. S. Petzold, Harry Hiatt, Henry M. Benton, Roy E. Fulmer, Lawrence G. Stevenson, Arthur L. Taylor, Floyd Pugh, Paul LeComte, Byron O. Greenwood, Burlen Boyle, Kenneth L. Meneely, H. I. Thornton, Donn C. Pickett, John Whitlock, Louis Marter, E. J. George, Wayne Toling, David Service, Ralph Hodges, Justus W. Hall, Hermine Fields, Eddie B. Sharpe, Charles E. Allenbaugh, Martha Snow, Ollie B. Allenbaugh, Margaret Kennedy, John G. Bacon, Kathleen Campbell, Maxine Abram, C. B. Wright, C. A. Smith, B. White, G. A. Gardner, E. G. Welch, T. C. Simpson, Carol E. Starkey (R. 410-412).

APPENDIX D.

The pertinent allegations in interveners' answer, as filed in Circuit Court of Appeals of the Seventh Circuit (omitting the caption and jurat), are as follows:

1. The order of the petitioner, National Labor Relations Board, dated February 14, 1936, which the petitioner is asking this Honorable Court to enforce, as it affects the interveners herein, was and is contrary to law, void and of no effect, for the following reasons, among others, to wit:

(a) The petitioner had no jurisdiction over the interveners in the proceedings in which said order was made.

(b) Petitioner had no jurisdiction over the employment status of the interveners in the proceedings in which said order was made.

(c) Said order was made without any notice to the interveners herein and deprives them of their property without due process of law.

(d) Said order was made without any hearing as to the rights of the interveners and deprives them of their property without due process of law.

(e) The persons designated as members of Columbian Enameling and Stamping Company, Inc., Union No. 19,694, were not then and there employees of the respondent, Columbian Enameling and Stamping Company, Inc., on the 22nd day of July, 1935, on the 6th day of December, 1935, nor on the 14th day of February, 1936.

2. The petitioner herein, the National Labor Relations Board, does not have authority to order the employer of the interveners herein to discharge said interveners from

its employ by reason of lack of notice, hearing and for the further reason that no dispute has arisen between the employer and these interveners or any violation of the Wagner Act has taken place.

3. The petitioner, the National Labor Relations Board, has, without any justification whatsoever, arbitrarily selected the date prior to any alleged violation of the Wagner Act by the employer of the interveners as the date determinative of the rights of the interveners, many of whom were employed by the aforesaid Columbian Enameling and Stamping Company, Inc., on or prior to the date of any alleged violation of the Wagner Act, as found by the petitioner.

4. The enforcement of said order of the National Labor Relations Board did impose upon the interveners severe and unconscionable hardships for the benefit of persons who were in no way injured by said interveners who voluntarily elected to remain idle when they could have accepted employment with the aforesaid respondent, as did the aforesaid interveners.

5. That the interveners herein, or a great number of them, were in the employ of the respondent, Columbian Enameling and Stamping Company, Inc., on the 6th day of December, 1935, and had been for many weeks and immediately prior thereto, and there was and is no disagreement between the interveners and the respondent, when said hearing was had by said National Labor Relations Board, nor was there any violation of the Wagner Act by the employer of the interveners herein at any of said times aforesaid.

6. The order so made by the petitioner, under date of February 14, 1936, is void, as it deprives the interveners

herein, who are citizens of the United States, of their property without due process of law and the equal protection of law as guaranteed under the Fifth Amendment, Section 1, to the Constitution of the United States.

Wherefore, the interveners prav that this Honorable Court shall make and enter a decree setting aside the order of the National Labor Relations Board as it affects said interveners and all other just and proper relief.

Dated at Terre Haute, Indiana, this 17th day of December, 1937.

Paul R. Shafer,
Attorney for Interveners.

SUPREME COURT OF THE UNITED STATES.

No. 229.—October Term, 1938.

National Labor Relations Board, Petitioner, *vs.* Columbian Enameling and Stamping Company, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 27, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

This petition tests the validity of an order of the National Labor Relations Board of February 14, 1936, directing respondent to discharge from its service employees who were not employed by it on July 22, 1935; to reinstate, to the vacancies so created, those who were employed on that date and have not since received substantially equivalent employment elsewhere; and to desist from refusing to bargain collectively with Enameling and Stamping Mill Employees Union No. 19694 as the exclusive representative of respondent's production employees with respect to rates of pay, wages, hours, and other conditions of employment. Unless the finding of the Board that respondent had refused to bargain collectively with the Union on July 23, 1935, is sustained by the evidence, the order is invalid.

Pursuant to a charge lodged with it by the Union, the Board issued its complaint charging respondent with unfair labor practices affecting interstate commerce within the meaning of § 8(1) and (5) of the National Labor Relations Act. 49 Stat. 449. After hearing, the Board made findings which, so far as now relevant, may be summarized as follows: Respondent corporation is engaged at Terre Haute, Indiana, in the manufacture and sale in interstate commerce of metal utensils and other products. On July 14, 1934, respondent and the Union entered into a written contract for one year, terminable on thirty days' notice, prescribing various conditions of employment. It provided that no employee should be discriminated against by reason of membership or non-membership in,

or affiliation or non-affiliation with any union or labor organization. It also provided for arbitration, before an arbitration committee, of disputes arising under the contract, and that "There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration".

Between the date of the signing of the agreement, July 14, 1934, and March 23, 1935, respondent's officers held numerous meetings with representatives of the Union, usually the Union Scale Committee, for the consideration and adjustment of various demands of the Union. At a meeting on January 4, 1935, the committee presented a number of requests, among them the demand that respondent should discharge any employees who might be suspended by the Union. This and the other demands were rejected by respondent, and a later request that the demands of January 4th be arbitrated was likewise refused on the ground that they were not arbitrable under the agreement. The committee afterward presented new demands at other meetings and then at a meeting on March 11th renewed the demands of January 4th, which respondent again rejected. On March 17th the Union passed resolutions reciting grievances and demanding a closed shop, and on March 23rd ordered a strike, when four hundred and fifty of respondent's five hundred employees left work. On March 30th respondent announced that its factory was closed indefinitely.

The strike was in effect July 5, 1935, when the National Labor Relations Act was approved, and continued until about July 23rd, when respondent resumed operations at its plant. By August 19th it had received three thousand applications for employment and had reemployed one hundred and ninety of its production employees. By the end of the second week in September respondent had employed a full force. On July 23rd two labor conciliators from the Department of Labor appeared in Terre Haute and were requested by the Union "to try and open up negotiations with the respondent". On that day the conciliators met and conferred with respondent's president, who agreed to meet them with the Scale Committee. Several days later he informed them that he would not meet with them or with the Scale Committee. Later respondent received, but did not answer, letters of the Union of September 20th and October 11th, asking for a meeting to settle the controversy between them.

The Board concluded that on July 23rd the "union represented a majority of the respondent's employees, that it sought to bargain with the respondent, that the respondent refused to so bargain, and that this constituted an unfair labor practice" within the meaning of § 8, subdivision (5) of the Act. It ordered respondent to discharge all of its production employees who were not employed by it on July 22, 1935, to reinstate its employees as of that date, and thereupon to desist from refusing to bargain with the Union as the exclusive representative of respondent's production employees.

Application by the Board for a decree enforcing its order was denied by the Circuit Court of Appeals for the Seventh Circuit, 96 F. (2d) 948, on the ground that as the employees had struck before the enactment of the National Labor Relations Act, in violation of their contract not to strike and to submit differences to arbitration, they did not retain and were not entitled to protection of their status as employees under § 2(3) of the Act. We granted certiorari October 10, 1938, the questions presented with respect to the administration of the National Labor Relations Act being of public importance.

The Board's order is without support unless the date of the refusal to bargain collectively be fixed as on July 23, 1935. The evidence and findings leave no doubt that later, in September, respondent ignored the Union's request for collective bargaining, but as at that time respondent's factory had been reopened and was operating with a full complement of production employees, the refusal to bargain could afford no basis for an order by the Board directing, as of that date, the discharge of new employees and their replacement by strikers. Restoration of the strikers to their employment, by order of the Board, under § 10(c) of the Act, could as a practical matter be effected only if respondent had failed in its statutory duty to bargain collectively at some time after the approval of the National Labor Relations Act on July 5th, and before respondent had resumed normal operation of its factory. The date fixed by the Board was July 23rd, when respondent reopened its factory, and the occasion was the personal interview on that day and a later telephone conversation of respondent's president with the conciliators from the Labor Department, who were not members or official representatives of the Union and who, so far as the testimony discloses, did not then appear to the president to be authorized to speak for the Union.

In appraising these transactions between the conciliators and respondent's president, it is important to bear in mind the nature and extent of the legal duty imposed upon the employer by the National Labor Relations Act. Section 8(5) declares that it is an "unfair labor practice" for an employer "To refuse to bargain collectively with the representatives of his employees", and §§ 2 and 10(c) give to the Board an extensive authority to order the employer to cease an unfair labor practice and to compel reinstatement of employees with back pay when employment has ceased in consequence of a labor dispute or unfair labor practice. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. While the Act thus makes it the employer's duty to bargain with his employees, and failure to perform that duty entails serious consequences to him, it imposes no like duty on his employees. Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.

However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees, without violation of law and without suffering the drastic consequences which violation may entail. To put the employer in default here the employees must at least have signified to respondent their desire to negotiate. Measured by this test the Board's conclusion that respondent refused to bargain with the Union is without support, for the reason that there is no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain or that respondent knew that they represented the Union. The employer cannot, under the statute, be charged with refusal of that which is not proffered.

During the eight months preceding the strike respondent had, upon request, entered into negotiations with the Union on some eleven different occasions. Such meetings, always with some known representatives of the Union, were customarily with the Union Scale Committee and on its written request. All negotiations were broken off by the Union by the strike which followed almost immediately its resolutions of March 17th. On July 23rd the strike had continued for about four months, accompanied by picketing, violence and destruction of property, and had culminated, on July 22nd, in a proclamation of martial law. A meeting on June 11th had resulted in no change of attitude on either side. From then until July 23rd no attempt appears to have been made on either side to resume negotiations.

While there was before the Board testimony of the secretary of the Union that on July 23rd he had asked the conciliators to "try and open up negotiations", there was no testimony that respondent or its officers had ever been informed of that fact or that they were advised in any way of the willingness of the Union to enter into negotiations. This was pointedly brought to the attention of the Board and the trial examiner by a motion to strike the testimony of the secretary and that of respondent's president, giving his account of his interview with the conciliators. But the conciliators were not called as witnesses and no attempt was made to supply the omission.

Respondent's president testified that on July 23rd the conciliators asked him if he would meet with them and the Scale Committee; that he replied that he would; that no meeting was arranged and that several days later he called one of the conciliators on the telephone and informed him that he, the witness, "would not have any meeting with him or with the Scale Committee". All else that took place between the conciliators and respondent is left a matter of conjecture.

This testimony, on which the Board relies to support its finding, shows on its face that there was no indication until sometime later than July 23rd of any unwillingness on the part of respondent's president to meet the Union. Furthermore, it contains no hint that the Union at any time after July 5th and before September communicated to respondent its willingness to bargain, or that the conciliators, in asking a meeting and discussing the matter with respondent's president, purported to speak for the Union. The testimony is consistent throughout with the inference, and indeed sup-

ports it, that the conciliators, so far as known to respondent, appeared in their official role as mediators to compose the long-standing dispute between respondent and its employees; that the employer first consented in advance to attend a meeting, and later withdrew its consent when they had failed for some days to arrange a meeting. Whether in the meantime the Scale Committee or any other representative of the Union was in fact willing to attend a meeting does not appear.

Section 10(e) of the Act provides: " . . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive." But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142; *Consolidated Edison Co. of New York* v. *National Labor Relations Board*, decided December 5, 1938; *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. (2d) 985, 989; *National Labor Relations Board* v. *Thompson Products Inc.*, 97 F. (2d) 13; *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Board*, 98 F. (2d) 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York* v. *National Labor Relations Board, supra*, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *B. & O. R. R. Co.* v. *Groeger*, 266 U. S. 521, 524; *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra*, 989.

Judged by these tests or any of them we cannot say that there was substantial evidence that respondent at any time between July 5, 1935, and September, 1935, was aware that the Union desired or sought to bargain collectively with respondent, or that there is support in the evidence for the Board's conclusion that on or about July 25, 1935 respondent refused to bargain collectively with the Union.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 229.—October Term, 1938.

National Labor Relations Board, *vs.* Columbian Enameling and Stamping Company, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 27, 1939.]

Mr. Justice Black, dissenting.

The Labor Board was given jurisdiction by Congress to hear and weigh evidence and to determine the inferences from it; to make findings of fact; and to issue orders necessary to effectuate the purposes of the National Labor Relations Act. In apt language, Congress limited the power of courts to review the Board's findings by providing in the Act that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive."

I believe that "The inferences to be drawn were for the Board and not the courts,"[1] and that the inferences drawn by the Board were supported by the evidence. Courts should not—as here—substitute their appraisal of the evidence for that of the Board.

The Labor Board, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission and many other administrative agencies were all created to deal with problems of regulation of ever increasing complexity in the economic fields of trade, finance and industrial conflicts. Congress thus sought to utilize procedures more expeditious and administered by more specialized and experienced experts than courts had been able to afford. The decision here tends to nullify this Congressional effort.

The Labor Board concluded that "On or about July 23, 1935, the company refused to bargain collectively with the Union as the representatives of its employees, or at all, ..." This conclusion is here set aside only because the Court believes the evi-

[1] National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 271.

dence before the Board did not support its particular underlying finding that "It seems clear that . . . [the] president of the respondent, knew that the Union was seeking through the [Federal] conciliators to bargain with the respondent with respect to the settlement of the strike."

Undisputed evidence disclosed that on July 23, 1935, the conciliators—at the express instance of the Union—conferred for three or four hours with the president of respondent; that the only purpose of the conciliators was to arrange a meeting between the company and the Union in order to bring about collective bargaining; that the president agreed with the conciliators to meet the Union and the conciliators at a date to be set; but that several days thereafter (when the company had obtained other employees and was operating under the protection of the militia) the president—again acting for the company—called the conciliators and flatly refused to meet further with them or the Union. The Court finds only a single link missing in the chain of evidence showing that the company refused to bargain with the Union, i.e., that there was no evidence to justify the Board's finding that the president of the company was aware the conciliators had approached the company at the request of the Union. But the "courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of" an administrative body.[2] And the story in this record discloses a broad basis for the inference that the company did know it was actually refusing the Union's request.

For thirty-three years prior to July, 1934, the company ran a non-Union plant. About that date, a majority of the employees were organized by an affiliate of the American Federation of Labor. The company first refused to sign an agreement with the Union but did so, July 14, 1934, upon the intervention of the Regional Labor Board functioning under the National Industrial Recovery Act. This agreement was to continue a year, was subject to modification by mutual consent, and provided for arbitration of disputes arising under it. Thereafter, pursuant to the agreement, meetings were held between the Union and respondent and the Union submitted repeated requests and grievances, relating to the "check-off" system, wage increases, the possibility of a closed shop, etc. These were refused and counter grievances of the company

[2] Federal Trade Commission v. Standard Education Society, 302 U. S. 112, 117; Federal Trade Commission v. Algoma Co., 291 U. S. 67, 73; cf., Federal Trade Commission v. Keppel & Bro., 291 U. S. 304, 314.

were submitted and discussed. In meetings and by mail, the Union continued to submit grievances—that back-pay accrued during shut-downs was owing, that the company was dealing with individual employees and, in March, 1935, that the company by refusing to arbitrate had broken its agreement. March 22, the Union called a strike, the testimony showing that it was called "on account of the company's refusal to honor and abide by the agreement signed before the Labor Board July 14, 1934 . . . [as to] minimum days, wages, and any employee being called out and not used" and because the company had "refused arbitration on this agreement." Thereafter, the company closed its plant, consistently urged individual members of the Union to return to work and desert the Union's efforts—by strike—to obtain collective bargaining, and publicly announced that it would not meet with the members of the Union and that it was willing to take its individual employees back, but "without Union recognition or agreement." June 11, the company did meet with the Union's representatives but insured the impossibility of any successful collective bargaining by reiterating at the outset that the company would not recognize the Union. July 23, the Union asked the conciliators to see the President of the company.

To conclude that the company—through its president—was unaware the conciliators were acting at the instance of the Union, and, therefore, is not to be held responsible for its flat refusal to meet with its employees, is both to ignore the record and to shut our eyes to the realities of the conditions of modern industry and industrial strife. The atmosphere of a strike between an employer and employees with whom the employer is familiar does not evoke, and should not require, punctilious observance of legalistic formalities and social exactness in discussions relative to the settlement of the strike. It is difficult to imagine that—during several hours of conversation between the conciliators and the company's president concerning a future meeting of Union and company—the conciliators refrained from reference to the Union's request that the conciliators arrange such a future meeting. In a realistic view, the company's statement of July 23 to the conciliators, that it would meet with them and the Union, clearly indicated the company's acceptance of the fact that the conciliators were appearing for the Union. The company's declaration to the conciliators, several days later, that it would not meet with the Union or the conciliators,

equally represents the company's recognition and acceptance of the fact that the conciliators were a means of dealing with the Union.

Not only did the Labor Board find the evidence sufficient to show that the company refused to bargain with the Union on or about July 23, but the court below reached the same conclusion. The rule is well settled that findings of fact concurred in by two lower courts will not "be disturbed unless plainly without support."[3] This rule equally applies when an administrative body and a lower court—as here—concur on findings of fact,[4] and the rule is even more persuasive where, as in the Act creating the Labor Board, it is provided that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." The majority opinion,[5] of the Court of Appeals in this case said:

"This conclusion [refusal to enforce the Board's action] does not mean that we approve or uphold the refusal of the respondent to meet the request of the conciliators and enter into negotiations looking toward the settlement of disputes after the employees had quit their employment. Respondent's employees were largely unionized. Under the Act, respondent, when requested to negotiate, was in duty bound to do so. National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1. Instead it lent a friendly ear to unwise counsel wholly out of sympathy with the legislation designed to avoid and settle capital-labor disputes. It erred in its refusal to respect the law and . . . [ignored] the request of those charged with the burdensome task of working out a peaceful solution of what had become a bitter controversy. There is little or no explanation which we can find for their refusal, save an open defiant, flouting of the law of the land."

Respondent's striking employees remained employees—while on strike—within the meaning of the National Labor Relations Act (Sec. 2(3)) because their work had ceased "as the consequence of . . . [and] in connection with . . . [a] current labor dispute. . . ." The statutory rights of these striking employees could not be destroyed, and respondent could not commit unfair labor practices and then escape liability by reopening the plant with a full complement of non-Union men.

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[3] General Pictures Co. *v.* Electric Co., 304 U. S. 175, 178; United States *v.* Chemical Foundation, 272 U. S. 1, 14; Virginian Ry. *v.* Federation, 300 U. S. 515, 542.

[4] Illinois Central, etc., Railroad *v.* Interstate Commerce Commission, 206 U. S. 441, 466.

[5] Three judges sat in the court below. One wrote the opinion for the majority; the second judge concurred in the conclusion of that opinion; the third judge dissented but expressly found that there was evidence to support the findings that the company refused to bargain collectively with its employees.

Second. The court below was of opinion that the strike of March 22, 1935, violated the particular provision of the July 14, 1934, contract[6] with the company that "There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration." Solely because it believed the Union had violated its contract, the court below declined to enforce the Board's order, and held that the company could not be made responsible for its own violation of the Act.

In this, I believe the court below was in error. A disagreement over the terms of a contract governing employer-employee relations is a labor dispute within the terms of the Act. Such a disagreement can—as it did here—produce industrial strife which the Act was expressly designed to prevent. Had Congress provided that violation of a private contract would deprive employees and the public of the benefits of the law, a different question would be presented. But Congress did not so provide and, in addition, the Union did not violate its contract. It contracted not to strike "pending decision by the Committee of Arbitration" but there was no decision "pending." There was no arbitration pending because the company would not arbitrate. If the contract was broken, it was the company—not the Union—that broke it.

I believe the judgment of the court below should be reversed and that the Board's order should be enforced.

Mr. Justice REED joins in this dissent.

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[6] "In any case in which a satisfactory settlement of a dispute arising under this contract cannot be reached, such dispute shall be referred to a Committee of Arbitration composed of two persons selected by the Management, two persons selected by the Union, and fifth person to be selected by these four, who shall reach a decision which shall be final and binding upon both parties to this contract. There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration."

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